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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 64

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,
Cross-Appellants and *Petitioners,*

vs.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Cross-Appellee and *Respondent.*

CROSS-APPEAL FROM AND PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

OPPOSING STATEMENT OF THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, CROSS-APPELLEE AND RESPONDENT, AS TO JURISDICTION ON CROSS-APPEAL OR CERTIORARI.

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CHARLES MARKELL,
HENRY H. WATERS,
Counsel for The United Railways and Electric Company of Baltimore, Cross-Appellee and Respondent.

CASES CITED.

PAGE

Blodgett vs. Silberman, 277 U. S. 1 4

Newark vs. New Jersey, 262 U. S. 192 4

Pawhuska vs. Pawhuska Oil & Gas Co., 250 U. S. 394 4

Public Service Comm. vs. United Rwys. Co., 155 Md. 572 2

Staten Island Rapid Transit R. Co. vs. Transit Commission, 276 U. S. 603 4

Trenton vs. New Jersey, 262 U. S. 182 4

United Railways and Electric Co. vs. West, 278 U. S. , 49 S. Ct. 79 3

West vs. United Railways and Electric Co., 278 U. S. , 49 S. Ct. 79 3

STATUTES CITED.

1925 Feb. 13, C.229, 43 Stat. 936 (Section 237(a) of the Judicial Code) 2

1925 Feb. 13, C.229, 43 Stat. 936 (Section 237(b) of the Judicial Code) 2, 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 826.

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,
Cross-Appellants and *Petitioners,*

VS.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Cross-Appellee and *Respondent.*

CROSS-APPEAL FROM AND PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

OPPOSING STATEMENT OF THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, CROSS-APPELLEE AND RESPONDENT, AS TO JURISDICTION ON CROSS-APPEAL OR CERTIORARI.

The cross-appellants and petitioners, the Public Service Commission of Maryland, will be called the Commission; the cross-appellee and respondent The United Railways and Electric Company of Baltimore, will be called the Company.

The Commission seeks review, on cross-appeal and/or certiorari, of certain action on one question, viz., whether, on an issue of confiscation *vel non*, the Company's annual depreciation allowance should be based on present value or on cost of depreciable property. The Company has no desire to evade review of this question; indeed, the same question will doubtless be raised by the Commission in any event as part of the question of confiscation on the Company's appeal. The Company, however, has no power to confer jurisdiction on this Court by consent. It would seem that the Company ought to make some statement of its position as to jurisdiction.

Unless the Company's appeal under section 237(a) [October Term, 1928, No. 792] carries with it jurisdiction to review on cross-appeal any action reviewable on certiorari, this action as to depreciation could in any event, where the federal claim has been sustained, be reviewed only on certiorari under section 237(b). Whether this action, if reviewable, is reviewable on cross-appeal or on certiorari seems not very important; whether it is now reviewable at all is more important.

For present purposes three steps in the proceedings, judicial and administrative, now before this Court seem controlling: (1) On July 16, 1928, the Court of Appeals *inter alia* remanded the case to the Commission for further proceedings, to determine a proper depreciation allowance based not on cost but on present value and make any necessary rate changes accordingly [R. 1622-1653. *Public Service Comm. vs. United Rwys. Co.*, 155 Md. 572]; (2) on November 28, 1928, the Commission, pursuant to the opinion of the Court of Appeals, did determine a proper depreciation allowance and accordingly amended its previous order by limiting fares to 8¾ cents (or 10 cents cash) instead of 8 1/3 cents (or 9 cents cash) [R. 1695-1697]; (3) on March 20, 1929, the Court of Appeals affirmed a decree

of January 10, 1929, dismissing the *Company's* supplemental bill to enjoin enforcement of the Commission's rate order as amended on November 28, 1928 [R. 1712-1716]. Nobody "appealed" from, or prosecuted any judicial proceedings against, the Commission's action of November 28, 1928, in determining a proper depreciation allowance and increasing rates accordingly. The Commission now professes to appeal from the *first* of these three steps, viz., the decree of July 16, 1928, "made final by" the *third*, viz., the decree of March 20, 1929; what the Commission really attempts to appeal from is the *second* step, viz., its own action of November 28, 1928. In short, the Commission attempts to appeal not from the Court of Appeals to this Court, but from itself directly to this Court.

This Court has already decided that the decree of July 16, 1928, was not a final decree—either as to the questions decided against the Company or as to the question of depreciation. [*United Railways and Electric Company of Baltimore vs. West*, October Term, 1928, No. 464; *West vs. United Railways and Electric Company of Baltimore*, October Term, 1928, No. 465; 278 U. S. , 49 S. Ct. 79.] As to the question of depreciation, the decree of July 16, 1928, was *not* "made final" by the decree of March 20, 1929; by the Commission's action of November 28, 1928, in accordance with the opinion and decree of July 16, 1928, as to depreciation, that decree was *complied with* and that question has never since been presented to either the lower state court or the Court of Appeals.

If by a *final* decree of the Court of Appeals the Company's federal claim as to depreciation had been sustained, the Commission could have invoked review of such a decree on certiorari, not because the Commission itself has any constitutional or other federal right in the subject matter in controversy, but because section 237(b) confers this right of review on any party *against* whom a federal claim

is sustained. [*Blodgett vs. Silberman*, 277 U. S. 1.] The Commission, however, is a mere creature of the State of Maryland, and has no constitutional or other federal right of its own against its creator, the State of Maryland, or any other branch of the State Government, judicial, legislative or executive. [*Pawhuska vs. Pawhuska Oil & Gas Co.*, 250 U. S. 394; *Trenton vs. New Jersey*, 262 U. S. 182; *Newark vs. New Jersey*, 262 U. S. 192.] The Commission's action of November 28, 1928, in accordance with the decree of July 16, 1928, is not analogous to the action of an individual or a private corporation in paying under compulsion a money judgment or decree. Such compulsory private action ordinarily would not defeat a right of appellate review of the questions of private right involved in the judgment or decree. The Commission's action of November 28, 1928, as to depreciation was mere administrative action of the State of Maryland itself; the decree of July 16, 1928, was *judicial* action of the State, which constituted *part* (evidence, old and new, constituting another part) of the data on which this administrative action was based. This Court has already decided that the decree of July 16, 1928, was not a *final* decree, and therefore was not reviewable. The Commission's action of November 28, 1928, was not a *judicial* decree at all, and therefore is not directly reviewable by this Court. [*Staten Island Rapid Transit R. Co. vs. Transit Commission*, 276 U. S. 603.] The Court of Appeals' decree of March 20, 1929, was not a decree *as to depreciation* at all, and as to that question is not reviewable by this Court either on cross-appeal or on certiorari.

At this stage the Company refrains from discussing the merits (or the grounds of decision below, non-federal as well as federal) of the question as to depreciation, not because under the decisions of this Court this question seems to be doubtful or of itself to deserve review on certiorari, but because, the case being already here on the Company's

appeal, the Company would not ask that consideration of this question be excluded by denial of *discretionary* jurisdiction. The Company's position is that action on this question is not now reviewable at all in this Court, either as of right on cross-appeal or in the exercise of discretionary jurisdiction on certiorari. How far the same question may be incidentally involved in the main question presented on the Company's appeal, of course is not now to be determined.

Respectfully submitted,

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Counsel for The United Railways and Electric Company of Baltimore, Cross-Appellee and Respondent.